

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

WILLISTON INVESTMENT GROUP, LLC,)
a Nevada limited Liability Company,)
Plaintiff,)
vs.)

Case No.: 2:14-cv-02038-GMN-PAL

ORDER

JP MORGAN CHASE BANK NATIONAL)
ASSOCIATION, a National Association;)
MORTGAGE ELECTRONIC)
REGISTRATION SYSTEMS, INC., a Foreign)
Corporation; MTC FINANCIAL, INC., a)
Foreign Corporation; FEDERAL HOME)
LOAN MORTGAGE CORPORATION, a)
Foreign Corporation; ROBERT WAKEFIELD,)
an individual; DOES I through X; and ROE)
CORPORATIONS I through X, inclusive,)
Defendants,)

FEDERAL HOUSING FINANCE AGENCY,)
as Conservator of the Federal National)
Mortgage Corporation,)
Intervenor,)

JP MORGAN CHASE BANK NATIONAL)
ASSOCIATION, a National Association;)
MORTGAGE ELECTRONIC)
REGISTRATION SYSTEMS, INC., a Foreign)
Corporation; and FEDERAL HOME LOAN)
MORTGAGE CORPORATION, a)
Foreign Corporation,)

Counter-Plaintiffs,)
vs.)

WILLISTON INVESTMENT GROUP, LLC;)
and DESERT LINN CONDOMINIUMS,)
Counter-Defendants.)

Pending before the Court is the Motion to Dismiss (ECF No. 5) filed by Defendant MTC Financial Inc. dba Trustee Corps (“Trustee Corps”). Plaintiff/Counter-Defendant Williston Investment Group, LLC (“Plaintiff”) filed a Response (ECF No. 18), and Trustee Corps filed a Reply (ECF No. 29).

I. BACKGROUND

This case arises out of a dispute between the parties over the effects of Desert Linn Condominiums’ (the “HOA”) foreclosure on their “super-priority” interest in real property under Nevada Revised Statutes § 116.3116.

On July 12, 2005, Robert Wakefield (“Wakefield”) obtained a loan in the amount of \$153,000 from Washington Mutual Bank, FA (“WAMU”) that was secured by a Deed of Trust on real property located at 1519 Lake Placid Terrace, Henderson, Nevada 89014 (the “Property”). (Deed of Trust, ECF No. 6-1).¹ The Deed of Trust named WAMU as the beneficiary and California Reconveyance Company as the trustee. (*Id.*). On August 14, 2012, JPMorgan Chase Bank, N.A. (“Chase”) substituted Trustee Corps as the trustee of the Deed of Trust. (Substitution of Trustee, ECF No. 6-2).

Upon Wakefield’s failure to maintain payments for assessments by the HOA, the Property was sold by the HOA at public auction on March 15, 2013. (Compl. ¶ 26–32, ECF No. 1-1). Plaintiff purchased the Property as the highest bidder at the HOA foreclosure sale. (Foreclosure Deed, ECF No. 6-9).

Meanwhile, on August 13, 2013, Trustee Corps recorded a Notice of Breach and Default and Election to Sell, indicating that Wakefield had failed to perform obligations pursuant to the Deed of Trust. (Not. of Breach and Default and Election to Sell, ECF No. 6-3).

On June 3, 2014, Trustee Corps recorded a Notice of Trustee’s Sale, setting a trustee sale of the

¹ The Court takes judicial notice of Exhibits 1–9 (ECF Nos. 6-1–6-9) of Trustee Corps’ Request for Judicial Notice. *See Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Each of these documents is publicly recorded in the Clark County Recorder’s office.

1 Property on July 11, 2014. (Not. of Trustee's Sale, ECF No. 6-5). Freddie Mac subsequently
2 purchased the Property as the highest bidder at the July 11, 2014 trustee sale (Trustee's Deed
3 Upon Sale, ECF No. 6-7), and Chase assigned the beneficial interest in the Deed of Trust to
4 Freddie Mac on June 16, 2014 (Assignment of Deed of Trust, ECF No. 6-6).

5 **II. LEGAL STANDARD**

6 Dismissal is appropriate under Rule 12(b)(6) where a pleader fails to state a claim upon
7 which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
8 555 (2007). A pleading must give fair notice of a legally cognizable claim and the grounds on
9 which it rests, and although a court must take all factual allegations as true, legal conclusions
10 couched as a factual allegation are insufficient. *Twombly*, 550 U.S. at 555. Accordingly, Rule
11 12(b)(6) requires "more than labels and conclusions, and a formulaic recitation of the elements
12 of a cause of action will not do." *Id.*

13 "To survive a motion to dismiss, a complaint must contain sufficient factual matter,
14 accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556
15 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). "A claim has facial plausibility
16 when the plaintiff pleads factual content that allows the court to draw the reasonable inference
17 that the defendant is liable for the misconduct alleged." *Id.* This standard "asks for more than a
18 sheer possibility that a defendant has acted unlawfully." *Id.*

19 "Generally, a district court may not consider any material beyond the pleadings in ruling
20 on a Rule 12(b)(6) motion." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542,
21 1555 n.19 (9th Cir. 1990). "However, material which is properly submitted as part of the
22 complaint may be considered." *Id.* Similarly, "documents whose contents are alleged in a
23 complaint and whose authenticity no party questions, but which are not physically attached to
24 the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without
25 converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14
F.3d 449, 454 (9th Cir. 1994). On a motion to dismiss, a court may also take judicial notice of

1 “matters of public record.” *Mack*, 798 F.2d at 1282. Otherwise, if a court considers materials
 2 outside of the pleadings, the motion to dismiss is converted into a motion for summary
 3 judgment. Fed. R. Civ. P. 12(d).

4 If the court grants a motion to dismiss for failure to state a claim, leave to amend should
 5 be granted unless it is clear that the deficiencies of the complaint cannot be cured by
 6 amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). Pursuant
 7 to Rule 15(a), the court should “freely” give leave to amend “when justice so requires,” and in
 8 the absence of a reason such as “undue delay, bad faith or dilatory motive on the part of the
 9 movant, repeated failure to cure deficiencies by amendments previously allowed, undue
 10 prejudice to the opposing party by virtue of allowance of the amendment, futility of the
 11 amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

12 **III. DISCUSSION**

13 **A. Wrongful Foreclosure**

14 Plaintiff’s first claim for relief alleges that, because “Defendants’ trustee sale was
 15 conducted on July 11, 2014, after the Deed of Trust was extinguished, CHASE and [Trustee
 16 Corps] could not meet the requirements imposed by Assembly Bill 284, as codified in NRS
 17 107.080(2)(c), and the Property was unlawfully sold without legal authority.” (Compl. ¶ 55,
 18 ECF No. 1-1). Moreover, Plaintiff alleges that “Defendants’ sale of the Property, under the
 19 circumstances of the record, is contrary to equity and good conscience in that such sale was
 20 instituted by parties who had no legal standing to institute or maintain the foreclosure *ab*
 21 *initio*.” (*Id.* ¶ 56). As a result, Plaintiff requests that the Court vacate the July 11, 2014 trustee
 22 sale, award damages, and award attorney’s fees and costs. (*Id.* ¶ 57–59).

23 Trustee Corps contends that “Plaintiff does not plead *what* in the notice of default or in
 24 the accompanying affidavit was defective or deficient.” (Mot. to Dismiss 14:28–15:1, ECF No.
 25 5). NRS 107.080(2)(c) requires that a trustee include in its notice of the breach and of the

1 election to sell “a notarized affidavit of authority to exercise the power of sale.” Here, Plaintiff
2 alleges that Trustee Corps violated NRS 107.080(2)(c) because it did not have the authority to
3 exercise the power of sale. (*See* Compl. ¶¶ 55–56). Accordingly, the Court finds that Plaintiff
4 has adequately pled a claim of wrongful foreclosure against Trustee Corps based on violation
5 of NRS 107.080(2)(c).

6 However, Trustee Corps also contends that Plaintiff’s claim is time-barred by NRS
7 107.080(5) or (6). (Mot. to Dismiss 15:8–18). Pursuant to NRS 107.080(5)(b), a claim for
8 violation of NRS 107.080 has to be made “within 45 days after the date of the sale.” Although,
9 “[i]f proper notice is not provided ... the person who did not receive such proper notice may
10 commence an action pursuant to subsection 5 within 60 days after the date on which the person
11 received actual notice of the sale.” NRS 107.080(6). The trustee sale occurred on July 11,
12 2014, and Plaintiff initiated the instant action on October 21, 2014—more than three months
13 after the date of sale. (*See* Compl.).

14 When a motion to dismiss is brought on the ground that the plaintiff's complaint is
15 untimely, “a complaint cannot be dismissed unless it appears beyond a doubt that the plaintiff
16 can prove no set of facts that would establish the timeliness of the claim.” *Supermail Cargo,*
17 *Inc. v. United States*, 68 F.3d 1204, 1207 (9th Cir. 1995). Here, Plaintiff does not allege in its
18 Complaint that it ever received proper notice. Additionally, Plaintiff does not allege when it
19 received actual notice. Moreover, the documents judicially noticed do not provide details as to
20 when Plaintiff received actual notice of Defendants’ sale. Accordingly, the Court cannot
21 determine whether Plaintiff’s claim of wrongful foreclosure is time-barred by NRS 107.080(5)
22 or (6) and thus, denies Trustee Corps’ Motion to Dismiss on such grounds.

23 **B. Quiet Title**

24 Plaintiff’s second claim for relief seeks a declaration under NRS 40.010 that none of the
25 defendants has any right, title, interest or claim to the Property. (Compl. ¶ 60–68). Trustee

Corps argues that this claim should be dismissed because Trustee Corps does not have and does not claim any interest in the Property. (Mot. to Dismiss 15:3–6). NRS § 40.010 states that “[a]n action may be brought by any person against another who claims an estate or interest in real property, adverse to the person bringing the action, for the purpose of determining such adverse claim.” Because Trustee Corps claims no estate or interest in the Property whatsoever, the Court grants Trustee Corps’ Motion to Dismiss as to this claim.

C. Slander of Title

Plaintiff’s third claim for relief alleges a claim of slander of title against Trustee Corps. (Compl. ¶¶ 69–78). To state a claim for slander of title, a plaintiff must allege that a defendant made (1) false and malicious communications; (2) disparaging to one’s title in land; (3) that cause special damages. *Higgins v. Higgins*, 744 P.2d 530, 531 (Nev. 1987) (per curiam).

Here, Plaintiff alleges that Trustee Corps “recorded a notice of default and election to sell the Property based on the previously extinguished Deed of Trust.” (Compl. ¶ 72). Moreover, Plaintiff alleges that Trustee Corps “knew that recording the notice of default relating to the extinguished Deed of Trust and their improper election to sell the Property would disrupt and deprive Plaintiff of his rights as current titleholder of the Property.” (*Id.* ¶ 73). Furthermore, Plaintiff alleges that, “[a]s the Deed of Trust was extinguished, the notice of default and election to sell was a false and malicious communication disparaging to Plaintiff’s title in land,” resulting in special damages sustained by Plaintiff. (*Id.* ¶ 75–76).

Accordingly, the Court finds that, taking Plaintiff’s allegations as true and construing them in the light most favorable to Plaintiff, the Complaint adequately pleads a claim of slander of title. Although Trustee Corps contends that malice cannot be shown based on its interpretation of existing law at the time of recording pertinent documents in this case, such issues are not amenable at the motion to dismiss stage because the Court cannot look beyond the pleadings of the Complaint or the judicially-noticed documents. *See Hal Roach Studios*, 896

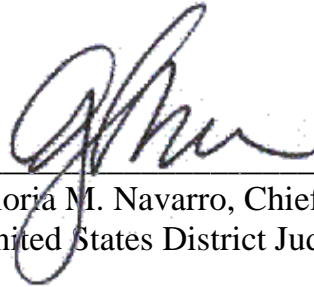
1 F.2d at 1555 n.19. Therefore, the Court denies Trustee Corps' Motion to Dismiss as to this
2 claim.

3 **IV. CONCLUSION**

4 **IT IS HEREBY ORDERED** that Trustee Corps' Motion to Dismiss (ECF No. 5) is
5 **GRANTED in part** and **DENIED in part**. Plaintiff's quiet title claim is dismissed with
6 prejudice as to Trustee Corps. However, Trustee Corps' Motion to Dismiss is denied as to
7 Plaintiff's claims of wrongful foreclosure and slander of title as to Trustee Corps.

8 **DATED** this 12th day of June, 2015.

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Gloria M. Navarro, Chief Judge
United States District Judge